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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 766

EDWARD K. BARSKY, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA.

MOTION OF CIVIL RIGHTS CONGRESS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF

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MISCELLANEOUS

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This case presents important questions affecting the breadth of the protection afforded by the First Amendment. Upon their determination may very well depend the preservation of the guaranties of speech from alternation by ingenious maneuvers designed to circumvent the protective principles which this Court has declared guard the liberties embodied in the First Amendment.

The Civil Rights Congress, dedicated as it is to the maintenance of these basic freedoms, "the matrix, the indispensable condition of nearly every other form of freedom",[1] seeks to appear here as amicus curiae so that

[1] *Palko* v. *Connecticut*, 302 U. S. 319, 327.

it may call attention to the broad implications of the majority opinion below and to its adverse influence upon the course of civil liberties in this country. It adopts and supports the petitioner's position with respect to the issues raised, but in this, its brief in support of the petition for a writ of certiorari to the Court of Appeals for the District of Columbia, it will discuss only the serious constitutional questions affecting the First Amendment raised by the record. Permission to file this brief has been obtained from the petitioners, and has been sought from the government, although no response has been received. The Civil Rights Congress, therefore, respectfully moves that it be permitted to file the attached brief as *amicus curiae*.

BRIEF

THE FACTS

The salient facts are not, apparently, the subject of any real controversy. The petitioners were members of the executive committee of a voluntary unincorporated association, The Joint Anti-Fascist Refugee Committee. The aims of the Committee are non-political—to solicit funds to be disbursed for relief purposes in other countries.

The House Committee on Un-American Activities issued to the petitioners alleged subpoenas duces tecum calling for the production of the Committee's records "relating to the receipt and disbursement of certain money and certain correspondence with persons in foreign countries". The petitioners failed to produce the documents sought, although each of them appeared before the Committee.

The basic, although not the only, contention taken by the petitioners with respect to the validity of the subpoenas served upon them is, to quote the majority opinion below, "that the Resolution creating the Congressional Committee was unconstitutional because it authorized inquiry into political opinion and expression in violation of the First Amendment". This contention is based upon the language of the resolution [2] which creates a standing committee of Congress authorized "to make from time to time investigations of (i) the extent, character and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto what would aid Congress in any necessary remedial legislation".

[2] H. R. 5, 79th Cong., 1st Sess.

In sum, the petitioners resist the process issued by the Committee on the ground that the Congressional mandate exceeded the Constitutional limitations upon legislative power and did not, therefore, confer any authority upon the Committee. No general challenge is offered to the power of inquiry in aid of legislation; it is urged, however, that this power is circumscribed by the First Amendment to the same extent as are other powers of the Congress.

THE ISSUE

Can the Congress empower one of its Committees to inquire into matters concerning which its power to legislate is limited by the First Amendment and can such a Committee compel testimony in the face of the provisions of the First Amendment?

ARGUMENT

The First Amendment Constitutes an Affirmative Limitation Upon Congressional Power and Extends to All the Activities of Congress

The majority of the Court below supports its affirmance of the judgment of conviction by resort to the thesis that the power to inquire need not, in its exercise, guaranty that invalid legislation will not be adopted as a result. "Obviously, the possibility that invalid as well as valid legislation might ensue from an inquiry does not limit the power of inquiry." Rather, it is suggested that Congress is charged with the Constitutional duty, as a part of government, "to inquire into potential threats to itself, not alone for the selfish reason of self protection, but for the basic reason that having been established by the people as an instrumentality for the protection of the rights of people, it has an obligation to its creators to preserve itself. Moreover, the process whereby a change in the form of government can be accomplished has been prescribed by

the people in the same document which records the establishment of the presently existing machinery, and that process requires the Congress to initiate proposed amendments. We think that inquiry into threats to the existing form of government by extra-constitutional processes of change is a power of Congress under its prime obligation to protect for the people that machinery of which it is a part, and inquiry into the desirability *vel non* of other forms of government is a power of Congress under its mandate to initiate amendments if such become advisable."

The power of legislative inquiry as thus defined has virtually no limits. If, as the opinion declares, Congress can examine into matters on which it cannot legislate, but concerning which Constitutional amendments may be adopted, it is obvious that the only boundary to such an investigation is Congressional ingenuity in projecting constitutional change. On this theory, Congress could inquire into any field of activity, no matter how remote from normal federal influence and to that end call to its aid compulsory process. Even matters reserved to state action would not be immune to Congressional scrutiny. Committee subpoenas could be directed at state officials; the operation of state agencies could be examined; even such purely local matters as the relationship between the state and municipal governments could be made the object of Congressional investigations on the theory that a Constitutional amendment might bring such matters within the ambit of federal regulation.

The notion that a Congressional Committee may, in practical terms, abridge the enjoyment of free speech because Congress might conceivably introduce an amendment curtailing the protections of the First Amendment opens a convenient avenue of attack upon the amendment. What Congress cannot do by way of statute;[3] what the executive arm may not do by way of executive

[3] *Hartzel* v. *United States*, 322 U. S. 680, 687, 688; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 226.

power or administrative regulation;[4] what a court may not do by its construction and application of the laws,[5] is apparently left open to Congress through its power to inquire.

The First Amendment contains no exceptions. It applies to all branches of the federal government and to all phases of its power.[6] And the Fourteenth Amendment extends its provisions to state activity, in all its forms, as well.[7] In the face of repeated attempts, this court has uniformly resisted any suggestion that the First Amendment is apposite only within limited areas. It is available to protect the right of a person to criticize the courts;[8] it is a barrier to criminal prosecutions for opinion;[9] it limits the tax power of the states;[10] and even of the federal government;[11] it controls the activities of federal administrative agencies;[12] it sets bounds to the regulation by municipalities of the use of streets and other public places.[13] It would be an anomaly in-

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[4] *Hannigan* v. *Esquire, Inc.*, 327 U. S. 146, 158.

[5] *Herndon* v. *Lowry*, 301 U. S. 242; *Winters* v. *New York*, ... U. S. ....., 68 S. Ct. 665.

[6] *West Va.* v. *Barnette*, 319 U. S. 624, 638. "The very purpose of a Bill of Rights was to withdraw certain subjects from the necessitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

[7] *Gitlow* v. *New York*, 268 U. S. 652, 666.

[8] *Bridges* v. *California*, 314 U. S. 252.

[9] *Stromberg* v. *California*, 283 U. S. 359, 369, 370; *West Va.* v. *Barnette*, 319 U. S. 625.

[10] *Grosgean* v. *American Press Pub. Co.*, 297 U. S. 233; *Lovell* v. *City of Griffin*, 304 U. S. 444.

[11] *Basey* v. *Dist. of Columbia*, 319 U. S. 579.

[12] *NLRB* v. *Virginia Elec. & Power Co.*, 314 U. S. 469.

[13] *Schneider* v. *Irvington*, 308 U. S. 147.

deed if a Congressional investigating committee alone is free from the need to observe its dictate.

Argument is hardly needed to establish that any statute framed in the language of the mandate under which the Un-American Activities Committee presumes to function could not withstand challenge. House Resolution No. 5 which creates it speaks expressly and repeatedly of "Un-American propaganda", and of its "diffusion" within the United States. Its objectives are ideas which the Committee feels are undesirable; the exchange of opinions and the dissemination of thought which the Committee thinks dangerous. It is precisely such censorship of opinion which the First Amendment was designed to prevent.[14] When opinion can be made the gravamen of a crime, or the occasion for the imposition of any form of sanction, then free speech no longer exists.[15] When any man or group of men are at liberty to judge of the merits of an idea and to set in train punishment for those whose ideas repel them, then the First Amendment will lose its meaning.[16]

The majority opinion suggests, however, that the mere scope of House Resolution 5 in the light of the possibility that the Committee might set limits upon its own inquiry which are consonant with constitutional safeguards, does not justify disobedience to it. Aside from the fact that the Committee is notoriously disinclined to fix such boundaries to its activities and has, on the contrary,

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[14] *Near* v. *Minnesota,* 283 U. S. 697; *Winters* v. *New York,* supra.

[15] *Palko* v. *Connecticut,* supra. "So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overriden by the courts." Ibid, 327.

[16] *United States* v. *Ballard,* 322 U. S. 78.

utilized its power in the most extreme fashion,[17] this view does not meet the objection to the propriety of the resolution. The mandate must be tested not in terms of the possibility that it may be so narrowly construed that no invasion of personal liberty will result, but in the light of the power it purports to invest. This is particularly true since the judicial construction imposed upon it, in no way remedies its obvious defects.[18] Dealing with a state statute, the enforcement of which was defended by the assertion that the defendant's specific conduct could have been regarded as criminal, this court declared:

> "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship. An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. * * * Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression." *Thornhill* v. *Alabama,* 310 U. S. 88, 97.

Similarly, a licensing statute was denied enforcement because it granted uncontrolled discretion to the licensor, even though the defendant there had made no application

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[17] '47 Columbia Law Review, 46.

[18] *Winters* v. *New York,* supra, 68 S. Ct. at 669.

for a license and therefore could not claim an abuse of discretion.

> "As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it. She was entitled to contest its validity in answer to the charge against her." *Lovell* v. *City of Griffin*, 303 U. S. 444, 452, 453.

It is urged, however, that the Committee's conduct cannot constitute an abridgement of speech in a justiciable sense since no direct liability is imposed upon a witness, no matter what his answer. It is conceded that "embarrassment and damage" could flow, but this, it is said, is the result of "the current unpopularity of the revealed belief and activity." [19]

The court below, in brief, does not recognize the right to remain silent; it hedges the guarantee of free speech with the requirement of open declaration of opinion under compulsion, no matter what the consequences.[20] And yet a rational evaluation of human experience cannot but appreciate the importance of the right to privacy of opinion. There are many occasions when a refusal to speak cannot be defended by resort to the privilege against seif-incrimination, but where serious and immediate injury to the speaker is threatened. Thus an employee in the process of organizing a union would be foolhardy to divulge his purpose to his employer even though no unlawfulness can be imputed to his conduct. Federal statutes take cognizance of this reality and protect the employee's right to privacy.[21]

Here, too, as the majority appreciates, a witness exposes himself to the most direct and painful reprisal when he

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[19] Opinion, R. ——.

[20] Cf.: *West Virginia* v. *Barnette*, supra.

[21] *NLRB* v. *Armour & Co.*, 154 Fed. (2d) 570 (10 Cir., 1945).

testifies before the Committee.[22] Men have lost their employment because they have encountered its disfavor. The dilemma is insoluble. It is not a crime to entertain the political and social views which the Committee has made the main object of the inquiry. Thus, the witness cannot claim privilege. Should he be compelled to speak, however, his economic status suffers.

It is idle to say that where Congress asserts the power to force men and women into this position; where it offers them the choice between social sanctions and criminal penalties, it does not impose a restraint upon speech. This contradiction cannot be reconciled with the right to free enjoyment of opinion which the First Amendment protects. An issue so fundamental to our democratic institutions is one upon which this Court should pass.

Respectfully submitted,

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[22] The dissenting opinion, by Edgerton, J., describes the burden imposed upon freedom of speech thus: "The investigation restricts the freedom of speech by uncovering and advertising expressions of unpopular views. The Committee gives wide publicity to its proceedings. This exposes the men and women whose views are advertised to risks of insult, ostracism, and lasting loss of employment. Persons disposed to express unpopular views privately or to a selected group are often not disposed to risk the consequences to themselves and their families that publication may entail. The Committee's practice of discovering and advertising unpopular views is therefore a strong deterrent to any expression, however private, of such views." (R. .....)